

IV. Section-by-Section Analysis

Section 219.5 Definitions

Proposal

For purposes of FRA's rule on alcohol and drugs (part 219), the term "accident or incident reportable under Part 225" was redefined to exclude a case that is classified as "covered data" under Sec. 225.5 of this chapter (i.e., employee injury/illness cases exclusively resulting from a written recommendation to the employee by a physician or other licensed health care professional for time off when the employee instead returned to work, or for a work restriction when the employee instead worked unrestricted, or for a non-prescription medication recommended in writing to be taken at a prescription dose, whether or not the medication was taken). The term "accident or incident reportable under Part 225" appears in Sec. 219.301(b)(2), in the description of an event that authorizes breath testing for reasonable cause:

* * * * *

The employee has been involved in an accident or incident reportable under Part 225 of this chapter, and a supervisory employee of the railroad has a reasonable belief, based on specific, articulable facts, that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident;

* * * * *

[Emphasis added.] It should also be noted that Sec. 219.301(b)(2) is incorporated by reference in Sec. 219.301(c) as a basis for "for cause drug testing."

In addition, the definition of "reportable injury" for purposes of part 219 was revised to mean an injury reportable under part 225 of this chapter except for an injury that is classified as "covered data" under Sec. 225.5 of this chapter. The term "reportable injury" appears in three provisions of part 219, each of which describes an event that triggers the requirement for post-accident toxicological testing: (i) A "major train accident" that includes a release of hazardous material lading with a "reportable injury"

resulting from the release; (ii) an "impact accident" involving damage above the current reporting threshold and resulting in a "reportable injury"; and (iii) a passenger train accident with a "reportable injury" to any person. Sec. 219.201(a)(1)(ii)(B), 219.201(a)(2), and 219.201(a)(4).

The reason that "accident or incident reportable under Part 225" and "reportable injury" does not, for purposes of part 219, include covered data cases is that while these cases are of importance from the standpoint of rail safety analysis and therefore reportable, they are, nevertheless, comparatively less severe than fatalities, other injuries and illnesses and, as such, should not trigger alcohol and drug testing or related requirements and sanctions.

Comments and Final Rule/Decision

No specific comments were received on this section. Note, however, that comments were received on the definition of "covered data" and that the category of covered data has been expanded to include another subset of cases. See Sec. 225.39 and above discussion of covered data at section "III.H." of this preamble. The definitions have been adopted as proposed, except for the modifications made to the description of covered data cases.

Section 225.5 Definitions

Proposal

"Accident/incident" for purposes of FRA's accident/incident reporting rule was redefined to conform to OSHA's final rule. Under FRA's 1997 rule, "accident/incident" is defined in part as,

(3) Any event arising from the operation of a railroad which results in:

- (i) Death to any person;
- (ii) Injury to any person that requires medical treatment;
- (iii) Injury to a railroad employee that results in:
 - (A) A day away from work;
 - (B) Restricted work activity or job transfer; or
 - (C) Loss of consciousness; or
- (4) Occupational illness.

(The designation ``4)" in the definition above should read ``(iv)."
See Sec. 225.19(d)(3).) The parallel language in FRA's proposed
definition read as follows:

``Accident/incident" means:

* * * * *

(3) Any event or exposure arising from the operation of a
railroad, if the event or exposure is a discernable cause of one or
more of the following outcomes, and this outcome is a new case or a
significant aggravation of a pre-existing injury or illness:

(i) Death to any person;

(ii) Injury to any person that results in medical treatment;

(iii) Injury to a railroad employee that results in:

(A) A day away from work;

(B) Restricted work activity or job transfer; or

(C) Loss of consciousness;

(iv) Occupational illness of a railroad employee that results in
any of the following:

(A) A day away from work;

(B) Restricted work activity or job transfer;

(C) Loss of consciousness; or

(D) Medical treatment;

(v) A significant injury to or significant illness of a railroad
employee diagnosed by a physician or other licensed health care
professional even if it does not result in death, a day away from
work, restricted work activity or job transfer, medical treatment,
or loss of consciousness;

(vi) An illness or injury that meets the application of the
following specific case criteria:

(A) A needlestick or sharps injury to a railroad employee;

(B) Medical removal of a railroad employee;

(C) Occupational hearing loss of a railroad employee;

(D) Occupational tuberculosis of a railroad employee; or

(E) An occupational musculoskeletal disorder of a railroad
employee that is independently reportable under one or more of the
general reporting criteria.

The phrase "discernable cause" was included in the proposed definition, and the words "or exposure" were added before the word "arising." The addition of the word "discernable" was intended to take into account the OSHA-NAM settlement agreement, which also uses "discernable" to describe "cause." As defined in Webster's Third New International Dictionary, Unabridged (1971), "discernable" means "capable of being discerned by the senses or the understanding: distinguishable (a [sim] trend) (there was [sim] the outline of an old trunk-Floyd Dell)." FRA understands why some Working Group members requested this change as a matter of conformity and to emphasize that the employer is not required to speculate regarding work-relatedness. By the same token, FRA emphasizes that when confronted with specific claims regarding work-relatedness, it is the employer's responsibility to fairly evaluate those claims and opt for reporting if an event, exposure, or series of exposures in the workplace likely contributed to the cause or significantly aggravated the illness.

The Working Group agreed that the definition of "accident/incident" also needed to include that the case had to be a new case, or a significant aggravation of a pre-existing condition. This reference to a "new case" was added to conform to 29 CFR 1904.4(a)(2) of OSHA's final rule, and the reference to "significant" aggravation of a pre-existing condition was added to conform to the OSHA-NAM settlement agreement.

The inclusion of "death to any person" remained the same. "[I]njury to any person which requires medical treatment" was changed to "Injury to any person that results in medical treatment"; no substantive change was proposed. Injury to a railroad employee that results in "(A) A day away from work; (B) Restricted work activity or job transfer; or (C) Loss of consciousness" was not changed. FRA did, however, propose a change to the 1997 rule that all occupational illnesses of railroad employees are to be reported and required that they be reported only under certain enumerated conditions. This also made it clear that an occupational illness of an employee to a contractor to a railroad is not to be reported. Further, FRA proposed to add to its criteria for reportability "significant injuries or illnesses," "needlestick or sharps injuries," "medical removal,"

``occupational hearing loss," ``occupational tuberculosis," and an independently reportable ``occupational musculoskeletal disorder" to railroad employees to track OSHA's Final Rule. Finally, as previously discussed, a three-tier definition of ``event or exposure arising from the operation of a railroad" was added.

Comments and Final Rule/Decision

No specific comments were received on this definition. For the reasons stated above, the amendments have been adopted as proposed.

Proposal

The definition of ``accountable injury or illness" was revised by substituting the words ``railroad employee" for ``railroad worker," and by adding the word ``discernably" before the word ``associated." These were technical changes to bring the language into conformity with the rest of the regulatory text.

Comments and Final Rule/Decision

No specific comments were received on this definition. For the reasons stated above, the amendments have been adopted as proposed.

Proposal

Under the 1997 rule, the definition of ``day away from work" meant ``any day subsequent to the day of the injury or diagnosis of occupational illness that a railroad employee does not report to work for reasons associated with his or her condition." Sec. 225.5. Under the 1997 Guide, ``If the days away from work were entirely unconnected with the injury (e.g., plant closing or scheduled seasonal layoff), then the count can cease at this time." 1997 Guide, Ch. 6, p. 31, question 34. FRA proposed to come closer to following OSHA's general recording criteria under 29 CFR 1904.7 of ``day away from work" by proposing that the definition be ``any calendar day subsequent to the day of the injury or the diagnosis of the illness that a railroad employee does not report to work, or was recommended by a physician or other licensed health care professional not to return to work, as applicable, even if the employee was not scheduled to work on that day." Under the 1997 rule, if a doctor recommended that an employee not return to work, but the employee ignored the doctor's advice and returned to work anyway, this would not count as a day away from work. Under OSHA's Final Rule, however, the reporting entity would still have to count all the days the doctor recommended that the employee not work.

As a compromise, FRA proposed that the railroad be required to report as covered data one day away from work, even if the employee did not actually miss a day of work subsequent to the day of the injury or diagnosis of the illness, as discussed previously in the preamble. The revision of the definition of ``day away from work" was intended to take into account the new rule for reporting the number of days away from work.

The definition of ``day of restricted work activity" was revised for the same reason that FRA revised the definition of ``day away from work."

Comments and Final Rule/Decision

No specific comments were received on these definitions, however in its comments with respect to covered data cases, AAR sought clarification as to whether the same principles that applied to counting days away from work would apply to counting days of restricted work. At the post-NPRM Working Group meeting, FRA explained that the same principles would apply and agreed to edit the Guide to clarify that these cases are to be handled in the same manner. Upon further review of the Guide and the rule text definitions, FRA concluded that although all of the information concerning the reporting of days away from work and days of restricted work were present in the Guide and rule text collectively, the rule text definitions were not as clear as they could be in setting forth FRA's interpretation, as agreed upon by the Working Group. In an effort to avoid confusion and misinterpretation, FRA has amended the rule text definitions of ``day away from work" and ``day of restricted work activity," and the corresponding discussions in the Guide, for clarification. See also comments and related discussion on change in method of counting days and 180 day cap at sections ``III.J.1." and ``III.J.2." of this preamble.

Proposal

The definition of ``event or exposure arising from the operation of a railroad" was added to include the following: (1) With respect to a person who is on property owned, leased, or maintained by the railroad, an activity of the railroad that is related to the performance of its rail transportation business or an exposure related to the activity; (2) with respect to an employee of the railroad (whether on or off

property owned, leased, or maintained by the railroad), an activity of the railroad that is related to the performance of its rail transportation business or an exposure related to the activity; and (3) with respect to a person who is not a railroad employee and not on property owned, leased, or maintained by the railroad--(i) a train accident; a train incident; a highway-rail crossing accident/incident involving the railroad; or (ii) a release of a hazardous material from a railcar in the railroad's possession or a release of other dangerous commodity that is related to the performance of the railroad's rail transportation business. Accordingly, with respect to a person who is not a railroad employee and not on property owned, leased, or maintained by the railroad, the definition of "event or exposure arising from the operation of a railroad" is more narrow, covering a more limited number of circumstances than for persons who are either on railroad property, or for railroad employees whether on or off property owned, leased or maintained by the railroad. The justification for narrowing the set of circumstances in which a railroad is required to report certain injuries and illnesses for events that occur off railroad property is that it is difficult for railroads to know about, and follow up on, injuries off railroad property to persons who are not railroad employees, including employees of railroad contractors. Railroads simply have more limited opportunity to know about injuries and illnesses to persons other than those who are injured on their property or who are employed by the railroad. Accordingly, injuries to such persons are not to be considered for reporting purposes as events or exposures arising from the operation of the railroad.

Comments

Although no specific comments were received on the substance of the definition or proposal itself, AAR commented that the Guide's discussion of contractors did not reflect FRA's proposed approach and should be amended to do so.

Final Rule/Decision

FRA has adopted the proposal as stated and has amended the Guide to reflect this new approach. FRA intends to address the divergence from OSHA on the issue of the employee of a contractor in the MOU. See also earlier discussion of this issue at section "III.D.2." of this preamble.

Proposal

The definition of "medical treatment" was revised, as discussed earlier in the preamble, to conform generally to OSHA's new definition under 29 CFR 1904.7(b)(5)(i) of "medical treatment." The proposed definition read,

any medical care or treatment beyond "first aid" regardless of who provides such treatment. Medical treatment does not include diagnostic procedures, such as X-rays and drawing blood samples. Medical treatment also does not include counseling.

FRA proposed that any type of counseling, in and of itself, is not considered to be medical treatment. If, for example, a locomotive engineer witnesses a grade crossing fatality and subsequently receives counseling after being diagnosed as suffering from Post Traumatic Stress Syndrome, the case is not reportable. The only factors that would make the case reportable would be if, in addition to the counseling, the employee receives prescription medication (such as tranquilizers) has a day away from work, is placed on restricted work, is transferred to another job, or meets one of the other criteria for reportability in Sec. 225.19(d). In addition to the general objective of inter-industry conformity, this change is supported by the absence of meaningful interventions available to prevent such disorders. Although involvement in highway-rail grade crossing and trespass casualties is a known cause of stress in the railroad industry, FRA and the regulated community are already aware of that fact and are making every effort to prevent these occurrences. Further, the industry is actively engaged in preventive post-event counseling.

Comments and Final Rule/Decision

No specific comments were received concerning the definition of "medical treatment." The definition of "medical treatment" has been adopted as proposed. However, the issue of what constitutes medical treatment was raised with respect to the classification of the administration of oxygen and one-time dosages of prescription medication. These issues were resolved by FRA, and the provisions have been amended accordingly. For a more detailed discussion, please see sections "III.J.3." and "III.H." of the preamble, above.

Proposal

``General reportability criteria" was defined as the criteria set forth in Sec. 225.19(d)(1)-(5).

Comments and Final Rule/Decision

No specific comments were received on this definition. FRA has adopted the definition as proposed.

Proposal

``Medical removal" was defined as it is described in OSHA's recording criteria under 29 CFR 1904.9 for medical removal cases. ``Medical removal" refers to removing an employee from a work location because that location has been determined to be a health hazard. FRA proposed that this definition change automatically if OSHA elects to revise its recording criteria.

Comments

Although no specific comments were received on the definition itself, AAR commented that it was opposed to the concept of floating regulations.

Final Rule/Decision

FRA has adopted the proposed definition of ``medical removal" and its incorporation of OSHA's provision in 29 CFR part 1910. However, in order to make clear that FRA is not ``floating" this definition with OSHA's definition of that term, FRA has adopted a year-specific version of OSHA's definition, namely, the 2002 version. See also earlier discussion of this definition in the context of the ``float" vs. ``fixed" issue at section ``III.D.1." of this preamble.

Proposal

``Needlestick and sharps injury" and ``new case" were defined in general conformity with OSHA's definitions of these terms under 29 CFR 1904.8 and 1904.6, respectively.

Comments and Final Rule/Decision

No specific comments were received on these definitions. The definitions have been adopted as proposed.

Proposal

``Privacy concern case" was defined as in 29 CFR 1904.29, except that FRA would categorically exclude MSDs from its definition of ``privacy concern case." As discussed in section ``III.G.1.," above, FRA sought comment on whether or not FRA should adopt this exclusion,

especially if OSHA's proposed January 1, 2004, delay took effect, but in either case. FRA also sought comment on whether it should adopt the proposed exclusion of MSDs from its definition of "privacy concern case" as a fixed approach beginning on the effective date of FRA's final rule or whether FRA should "float" with OSHA, i.e., make the existence or nonexistence of the exclusion contingent on OSHA's action.

Comments and Final Rule/Decision

No specific comments were received on this definition. FRA has adopted the definition as proposed and has not adopted the exclusion of MSDs from its definition of "privacy concern case." See also discussion at section "III.G.1." of this preamble. FRA intends to address the slight differences on this issue in its MOU with OSHA.

Proposal

"Occupational hearing loss" was defined as OSHA defined it under 29 CFR 1904.10 for calendar year 2002. As discussed in section "III.D.1.," above, FRA sought comment on whether FRA should adopt OSHA's new approach for calendar year 2003 as its fixed approach, beginning on the effective date of FRA's final rule, or whether FRA should diverge from OSHA and continue to enforce OSHA's current approach (which was approved by the Working Group and the RSAC and is the same as FRA's current approach) as a fixed approach beginning on the effective date of FRA's final rule.

Comments

AAR strongly opposed the adoption of OSHA's new policy, noting that the policy would lead to a greater number of hearing loss cases being reported by the railroad industry and result in an adverse trend in the occurrence of railroad injuries regardless of the railroads' actual performance. After further discussion of the criteria at the post-NPRM meeting, AAR acquiesced in accepting the criteria for reporting, but was still concerned regarding the anticipated increases in reportables. AAR requested that FRA consider placing the hearing loss cases under covered data.

Final Rule/Decision

The importance of capturing the true magnitude of work-related hearing loss is justification alone for adopting OSHA's criteria; however, it is important to note that the increase in the number of

reportables will be partially offset by OSHA's reclassification as non-reportable many events that previously were reportable.¹⁹ For a more detailed discussion of this issue, see sections "III.D.1." and "III.H." of this preamble. Note that, for clarification and simplicity, the rule text definition has been amended to reflect the actual recording criteria used by OSHA (for calendar year 2003 and beyond) rather than the citation to the relevant section of OSHA's regulation. This amendment does not represent a substantive change from OSHA's criteria.

¹⁹ See earlier discussion concerning the definitions of "medical treatment" and "first aid" at section "III.J.3." of this preamble.

Proposal

The definition of "occupational illness" was revised to make it clear that only certain occupational illnesses of a person classified under Chapter 2 of the Guide as a Worker on Duty-Employee are to be reported. By contrast, under the 1997 definition of "occupational illness," other categories of persons, such as Worker on Duty-Contractor, were included in the definition, but illnesses to those persons were not reportable because Sec. 225.19(d)(4) limited the reportability of occupational illnesses to those of "a railroad employee."

Comments and Final Rule/Decision

No specific comments were received on this definition. The definition has been adopted as proposed.

Proposal

"Occupational musculoskeletal disorder" was defined essentially as it was set forth by OSHA in January 2001. See 29 CFR 1904.12 as published in 66 FR 6129. One of the most common forms of occupational musculoskeletal disorder is Carpal Tunnel Syndrome and other repetitive motion disorders. Under Sec. 1904.12 of its January 19, 2001, final rule, OSHA defined musculoskeletal disorders (MSDs) as:

disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs. MSDs do not include disorders caused by slips, trips, falls, motor vehicle accidents, or other similar accidents. Examples of MSDs include: Carpal tunnel syndrome, Rotator cuff syndrome, De Quervain's disease, Trigger finger, Tarsal tunnel syndrome, Sciatica, Epicondylitis, Tendinitis, Raynaud's phenomenon, Carpet layers knee, Herniated spinal disc, and Low back pain.

66 FR at 6129. See also 66 FR at 52034. However, as noted in the overview in section ``I." of this preamble, OSHA delayed the effective date of this provision from January 1, 2002, to January 1, 2003, and proposed delaying the effective date until January 1, 2004, ``to give [OSHA] the time necessary to resolve whether and how MSDs should be defined for recordkeeping purposes." See 67 FR 44125. After the publication of this NPRM, OSHA adopted this proposed delay in its December 17, 2002 final rule. See 67 FR 77165.

As the issue of OSHA's proposed delay of this provision was not before the Working Group when consensus was reached, FRA sought comment on whether or not FRA should still adopt the above definition of MSDs if OSHA's proposed January 1, 2004 delay took effect. FRA noted that if the provision were adopted as approved by the Working Group, FRA would be adopting the definition in advance of OSHA's defining the term, a result that may not have been contemplated by the Working Group when it agreed to follow OSHA on this issue prior to issuance of the proposed delay. See discussion concerning reporting criteria for MSDs at section ``III.D.1." of the preamble, above. Even if OSHA chose not to delay the effective date of this provision, FRA sought comment on whether or not FRA should even adopt OSHA's definition for calendar year 2003, since it stated that there were no special criteria beyond the general recording criteria for determining which MSDs to record and because OSHA's definition appeared to be used primarily as guidance for when to check the MSD column on the 300 Log. See 66 FR 6129-6130. It was noted that choosing to exclude this definition from FRA's final rule would not have affected an employer's obligation to report work-related injuries and illnesses involving muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs in accordance with the requirements applicable to any injury or illness. FRA also sought comment on whether

or not this definition should "float" with OSHA's. See discussion of "float" vs. "fixed" at section "III.D.1." of the preamble, above.

Comments

Although no specific comments were received regarding the adoption of a definition of an MSD, FRA raised the issue at the post-NPRM Working Group meeting. FRA pointed out that there were no special reporting criteria for MSDs and that there may be more problems in trying to delete the definition than to leave it in. Because MSDs must be independently reportable, there seemed to be little or no effect on the regulated community by retaining the proposed definition. AAR indicated that it was inclined to leave the definition in, but might reconsider the issue and provide us with a position after the meeting. However, no further comments were received.

Final Rule/Decision

For the reasons stated above, FRA has adopted the MSD definition as proposed. See also the discussion of MSDs in section "III.D.1." of this preamble, and the discussion of deleting the exclusion of MSDs from the definition of "privacy concern case" at section "III.G.1." of this preamble. Because FRA has adopted a requirement beyond what OSHA requires, this difference will be addressed in an MOU with OSHA, if necessary.

Proposal

"Occupational tuberculosis" was defined in general conformity with OSHA's recording criteria under 29 CFR 1904.11 for work-related tuberculosis cases. The word "occupational" was included in the term because the term is intended to cover only the occupational illness; it would be confusing to define simply "tuberculosis" when the unmodified term would seem to call for a medical definition of tuberculosis in general.

Comments and Final Rule/Decision

No specific comments were received on this definition. For the reasons stated above, the definition has been adopted as proposed.

Proposal

"Significant change in the number of reportable days away from work" was defined as a 10-percent or greater change in the number of days away from work that the railroad would have to report. FRA decided on 10 percent as the threshold so that railroads would not have to submit amended reports for de minimis changes in data. For example, if

a railroad estimated that an employee would be away from work for 30 days and reported the 30-day estimate to FRA, but the employee was actually away from work for 32 days, the railroad would not have to amend its accident report to reflect this change. Moreover, FRA uses a 10-percent threshold for amending rail equipment accident reports. Specifically, if a railroad estimates the damage from a rail equipment accident to be \$7,000, a railroad need not amend that report unless the actual damage exceeds \$7,700. If on the other hand, the actual damage is less than the reporting threshold, but less than 10-percent difference from the estimate, the railroad would be allowed to amend the report to indicate that the incident was not a reportable accident. For example, in the scenario above, if the actual damage was \$6,400 (less than 10-percent difference from the \$7,000 estimate), the railroad would nevertheless be permitted to withdraw its report of that accident. While the 10-percent threshold was included in Chapter 6 of the 1997 Guide, FRA proposed to create a definition in the regulatory text since the General Accounting Office recommended that FRA define this term. For clarification of the terms "significant illness" and "significant injury," see discussion in section "III.D.1." of the preamble, above.

Comments and Final Rule/Decision

No specific comments were received on this definition, however in its comments with respect to covered data cases, AAR sought clarification as to whether the same principles that applied to counting days away from work would apply to counting days of restricted work. At the post-NPRM Working Group meeting, FRA explained that the same principles would apply and agreed to edit the Guide to clarify that these cases are to be handled in the same manner. Upon further review of the Guide and the rule text definitions, FRA found that the rule text definition concerning a "significant change in the number of days away from work" did not express FRA's policy that the 10-percent threshold also applies to days of restricted work activity. Given that this policy was set forth in the 1997 Guide and was re-approved by the Working Group and the full RSAC for the 2003 Guide, FRA concluded that the definition should be amended to clarify that the same 10-percent threshold policy that applies to amending reports with respect to days away from work also applies with respect to days of restricted work activity.

Similarly, as noted in the preambles of the NPRM and this final rule, FRA uses a 10-percent threshold for amending rail equipment accident reports. Both the 1997 Guide and the 2003 Guide explain a railroad's duty to amend its rail equipment accident reports when an estimated value of the damage costs is significantly in error. A significant difference is defined as a 10-percent variance. Because FRA and the Working Group agreed that the Guide's explanation of "significant change in the number of reportable days away from work" should be included in the rule text as a definition, FRA concluded that it would be equally appropriate to include the Guide's explanation concerning a significant change for purposes of amending rail equipment accident reports. Accordingly, FRA has added a definition of "significant change in the damage costs for reportable rail equipment accidents/incidents" that conforms to FRA's previous policy on this matter.

Section 225.9 Telephonic Reports of Certain Accidents/Incidents and Other Events

Proposal

Under the 1997 rule, Sec. 225.9 required a railroad to report immediately by telephone any accident/incident arising from the operation of the railroad that resulted in the death of a railroad employee or railroad passenger or the death or injury of five or more persons. FRA proposed an amendment to this section, as recommended by the Working Group, to add new circumstances under which a railroad is to telephonically report and to clarify existing procedures for telephonic reporting of the expanded list of events.

Proposed subsection (a) listed the events that a railroad would be required to report telephonically. In proposed subsection (a)(1), "Certain deaths or injuries," FRA proposed that each railroad must report immediately, whenever it learns of the occurrence of an accident/incident that arose from the operation of the railroad, or an event or exposure that may have arisen from the operation of the railroad, that has certain specified consequences. FRA proposed to use the phrase "may have arisen" in the proposed regulatory text, instead

of keeping the current language ``arising from the operation of a railroad," because a railroad may not learn for some time that a particular event in fact arose from the operation of the railroad. By stating that a railroad must report an event that ``may" have arisen from the operation of the railroad, FRA is assured to capture a broader group of cases. For example, if a railroad employee dies of a heart attack on the railroad's property, the railroad may not know for weeks, following a coroner's report, what the cause of death was and whether the death was work-related. This case might not get immediately reported because the railroad did not immediately learn that the death arose out of the operation of the railroad. Under the proposed change, if the death ``may" have arisen out of the operation of the railroad, the case must be immediately reported, permitting FRA to commence its investigation in a timely manner. Even when death is ultimately determined to be caused by a coronary event, for instance, it is appropriate to inquire whether unusual workplace stressors (e.g., extreme heat, excessive physical activity without relief) may have played a role in causing the fatality. In addition, under subsection (a)(1), FRA has added the death of an employee of a contractor to a railroad performing work for the railroad on property owned, leased, or maintained by the contracting railroad as a new category requiring telephonic reporting.

In proposed subsection (a)(2), FRA captures certain train accidents or train incidents even if death or injury does not necessarily occur as a result of the accident or incident. Under the 1997 rule, FRA did not require telephonic reporting of certain train accidents or train incidents per se, but required that they be reported only if they resulted in death of a rail passenger or employee, or death or injury of five or more persons. Accordingly, FRA proposed that railroads telephonically report immediately, whenever it learns of the occurrence of any of the following events:

- (i) A train accident that results in serious injury to two or more train crewmembers or passengers requiring admission to a hospital;

- (ii) A train accident resulting in evacuation of a passenger train;

- (iii) A fatality at a highway-rail grade crossing as a result of a train accident or train incident;
- (iv) A train accident resulting in damage (based on a preliminary gross estimate) of \$150,000, to railroad and nonrailroad property; or
- (v) A train accident resulting in damage of \$25,000 or more to a passenger train, including railroad and nonrailroad property.

In proposed subsection (a)(3), FRA requires telephonic reporting of incidents in which a reportable derailment or collision occurs on, or fouls, a line used for scheduled passenger service. This final provision permits more timely initiation of investigation in cases where the underlying hazards involved could threaten the safety of passenger operations. For clarification of other aspects of this proposed section, see discussion at section ``III.C." of this preamble, above.

Comments and Final Rule/Decision

No specific comments were received on this issue. For the reasons stated above, the amendments have been adopted as proposed.

Section 225.19 Primary Groups of Accidents/Incidents

Proposal

FRA proposed to amend subsection (d), ``Group III, ``Death, injury, occupational illness." See prior discussion in section-by-section analysis of the definition of ``accident/incident" and ``event or exposure arising from the operation of a railroad" in Sec. 225.5.

Comments and Final Rule/Decision

No specific comments were received on this provision. The amendments have been adopted as proposed.

Section 225.23 Joint Operations

Proposal

FRA proposed to make technical amendments to Sec. 225.23(a) simply to bring it into conformity with the rest of the proposed regulatory text.

Comments and Final Rule/Decision

No specific comments were received on this provision. The amendments have been adopted as proposed.

Section 225.25 Recordkeeping

Proposal

FRA proposed to amend this section by revising subsection 225.25(h)(15) to apply to ``privacy concern cases," which would be defined in proposed Sec. 225.5. Accordingly, under the proposed subsection, a railroad is permitted not to post information on an occupational injury or illness that is a ``privacy concern case."

Comments and Final Rule/Decision

No specific comments were received on this provision. The amendments have been adopted as proposed.

Section 225.39 FRA Policy Statement on Covered Data

Proposal

In connection with the requirements for reporting employee illness/injury cases exclusively resulting from a written recommendation of a physician or other licensed health care provider (POLHCP) for time off when the employee instead returned to work, or a written recommendation for a work restriction when the employee instead worked unrestricted, and in connection with the provision for special reporting of cases exclusively resulting from the direction of a POLHCP in writing to take a non-prescription medication at prescription dose, FRA proposed that these cases not be included in FRA's regular statistical summaries. The data are requested by DOL to ensure comparability of employment-related safety data across industries. The data may also be utilized for other purposes as the need arises, but they would not be reported in FRA's periodic statistical summaries for the railroad industry.

Comments

AAR commented that the Guide needed to be clearer in its discussion of covered data so as to include: a definition of that term; instructions on how to report such cases; and clarification of the treatment of these cases in the questions-and-answers section of the Guide and in the instructions for Form FRA F 6180.55a. In its comments

on the NPRM, verbal comments at the post-NPRM Working Group Meeting, and post-meeting letter and e-mail, AAR expressed a concern a concern regarding the sharp increase in the number of reportables that would result by adopting the proposed changes. In order to soften the impact of these changes on the railroad industry data, AAR requested that the covered data criteria be extended to three other areas of reporting: one-time dosages of prescription medication, oxygen therapy, and occupational hearing loss.

Final Rule/Decision

FRA determined that the definition of ``covered data" in Sec. 225.39 and the corresponding discussion of covered data in the Guide should be amended to address AAR's concerns regarding clarity and to reflect the addition of one-time dosages of topical prescription medication. For a more detailed discussion of FRA's policy statement on covered data, see section ``III.H." of this preamble.

Section 240.117 Criteria for Consideration of Operating Rules Compliance Data

Proposal

FRA proposed a minor change to its locomotive engineer qualifications regulations, which uses a term from part 225. In particular, Sec. 240.117(e)(2) of the locomotive engineer qualifications regulations defines one of the types of violations of railroad rules and practices for the safe operation of trains that is a basis for revoking a locomotive engineer's certification pursuant to part 240; specifically, failures to adhere to the conditional clause of a restricted speed rule ``which cause reportable accidents or incidents under part 225 of this chapter. * * *" This amendment creates an exception for accidents or incidents that are classified as ``covered data" under part 225. The reason that ``covered data" were excluded as a partial basis for decertification under Sec. 240.117(e)(2) is that the injuries and illnesses associated with ``covered data" cases are comparatively less severe than other types of injuries and illnesses, and, as such, when coupled with a violation of restricted speed, should not trigger revocation under part 240.

Comments and Final Rule/Decision

No specific comments were received on this section. The exception has been adopted as proposed. Note, however, that comments were received on the definition of "covered data" and that the category of covered data has been expanded to include another subset of cases. See Sec. 225.39 and above discussion of covered data at section "III.H." of this preamble.